

आयकरअपीलीय अधिकरण, जयपुरन्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL,
JAIPUR BENCHES,"B" JAIPUR

श्रीसंदीपगोसाई,न्यायिकसदस्य एवंश्रीराठोडकमलेशजयन्तभाई, लेखा सदस्य के समक्ष
BEFORE: SHRI SANDEEP GOSAIN, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकरअपील सं./ITA No. 29 TO 32/JP/2023
निर्धारणवर्ष/Assessment Year : 2013-14 to 2016-17

The ITO Ward 6(2) Jaipur	बनाम Vs.	Smt. Sonal Jain C-6, Indrapuri Colony Lal Kothi, Jaipur – 302 015
स्थायीलेखा सं./जीआईआर सं./PAN/GIR No.: AHJPJ 3839 L		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

राजस्व की ओर से / Revenue by: Shri Ajey Malik, CIT-DR
निर्धारिती की ओर से / Assessee by : Shri P.C. Parwal, CA

सुनवाई की तारीख / Date of Hearing : 22/02/2023
उदघोषणा की तारीख / Date of Pronouncement: 28 /03/2023

आदेश / ORDER

PER BENCH

These four appeals have been filed by the Revenue against four different orders of the ld. CIT(A) dated 24-11-2022, National Faceless Appeal Centre, Delhi [hereinafter referred to as (NFAC)] for the assessment years 2013-14 to 2016-17 wherein common grounds raised in the above appeals by the Revenue are as under.

“1. Whether on the facts and circumstances of the case the ld. CIT(A) has erred to allow appeal of the assessee when there is no

technical error or lack of jurisdiction in the assessment order passed by the AO.

2. Whether on the facts and circumstances of the case the Id. CIT(A) has erred to allow appeal of the assessee merely relying on the order of CESTAT and without going into the merits of the case and also ignoring the facts that the said order of CESTAT has been challenged in further appeal.”

2.1 Since the issues in all the appeals are common, therefore, for the sake of convenience and brevity of the case, we take up the appeal of the Revenue in ITA No. 29/JP/2023 for adjudication.

2.2 Brief facts of the case are that the AO received information from DRI that assessee imported paper cup machines from China and evaded custom duty by undervaluation of these machines by 50% of actual transaction value before the Indian Customs. These were sold in domestic market by undervaluing them and balance amount was collected in cash from domestic customers. The AO provided the information as received from DRI to the assessee and issued a Show cause notice which was replied by the assessee to the AO. The DRI informed the AO that adjudicating authority had confirmed demand against the assessee and imposed penalty. Thus the AO held that assessee imported paper cup machines from China by undervaluing them and balance amount was paid by Hawala and thus the assessee sold machines to domestic customers by undervaluing them and the balance amount was taken in cash from the domestic customers. According to the

AO, the assessee imported 298 paper cup machines in Four A.Ys i.e. 2013-14 to 2016-17 but the assessee claimed that it had imported 366 paper cup machines during this period as per its books of accounts. The assessee declared sale of 12 paper cup machines during the year under consideration. Thus the AO calculated the undervalued purchase of 12 machines at Rs.7,65,602/- and made addition as undisclosed income in the hands of the assessee for the year under consideration. To this effect, the assessee filed further appeal before CESTAT who decided the appeal vide order dated 08-02-2012 in favour of the assessee on legal grounds as well as on merit by observing at para 11 to 21 as under:-

11. Heard both sides and perused the records of the case. The issue that requires consideration in the Instant appeal is as to whether documents in the form of computer printouts/extracts of WhatsApp messages images and load port documents/papers submitted by the shipping agents are, admissible as evidence and, if so, whether they conclusively establish the allegation of undervaluation as alleged by the department. We find that the main evidence put forth by the Revenue in the impugned case is in the form of-

- i. Copies of proforma invoices recovered from different premises (third party).
- ii. Uncertified load port documents submitted by the shipping agents (in India).
- iii. WhatsApp messages etc: alleged to have been recovered from the mobile phone.
- iv. Statements of individual persons.

12. The appellants have vehemently opposed the genuineness of the evidence, claiming that the same is not procured in a legally tenable manner and contents thereof are not examined by observing due process as per Section 138C of the Customs Act, 1962; the statements recorded were retracted. Coming to the proforma invoices recovered, it has been the allegation of the department that Proforma Invoice No.DB2012319 dated 19.0 degrees 10/2 relates to Bill of Entry No. 7362395 dated 11.07.2012 and Proforma Invoice DB No.20120607 dated 07.06.2012 pertains to Bill of entry. No. 7741855 dated 23.08.2012. Learned Counsel for the appellant have argued that on comparison of the proforma

Invoices recovered during the searches with the commercial Invoice supplied along with Bills of Entry, are not matching and there is a difference in the models and the same was not established by the department, and that the department has simply alleged that the appellant has declared Imported paper cup machines as TW-L12 Instead of DBL-12 model, Ld Counsel for the appellant submits that the proforma invoice cannot be the basis for redetermination of value of imported goods, especially in the absence of their correlation with Bills of Entry, seal/signature of the notice or the supplier. On going through the impugned order, we find that Ld Adjudicating authority has observed in para 7.5.5 of the impugned order, as follows:

"Interestingly, all these details including the model number of the machines, were missing from the imported commercial invoice bearing the same number as filed along with Bill of Entry no. 7362395 dt. 11.07.2012."

13. We find that having accepted that there is difference in the models as mentioned in the proforma invoices and the commercial Invoice, Learned Adjudicating authority proceeds to confirm the value reflected in the proforma Invoice, relying on the statement dt.20.06.2017 of Shri Raghudev Swamy (an outsider). We find, further the Learned Commissioner takes a peculiar stand that nevertheless, once the notice is issued alleging such a serious charge based on certain sets of evidences, the onus to prove otherwise shifts upon the Importer and they were under obligation to rebut the allegation with cogent documentary evidence to substantiate their claim and corroborate with evidence, which they have failed to do. Rather, importer has questioned the allegation and evidences on mere technical grounds. We find such argument by the adjudicating authority is not only specious but also not legally tenable. The allegations, if any, have to be proved by the Revenue authorities alleging the same. It is incorrect to say that the appellant has to disprove the allegations with cogent evidence. Such an argument runs against the settled position of law and as such the same is not acceptable. We find that Tribunal in the case of CCE. PUNE- IVs S.S. Engineers 2014(313) ELT 429 (Tri-Mumbai observed that -

7 We do agree with the observations of the adjudicating authority that proforma invoice has no legal sanctity in the eyes of law and same cannot be basis for the demand of differential duty. It is also an admitted fact that these proforma invoices were not accepted by the buyers and no payment was made by the buyers to the respondent as per these proforma Invoice. Therefore, the question of demand of differential duty does not arise. Accordingly, Revenue's appeals deserve no merit, hence it is dismissed

14. We find that proforma invoice is only an offer letter and does not conclusively establish the transaction. We find that Courts and Tribunals have consistently held that proforma Invoices cannot be evidence, at least in themselves. What is material is the transaction value. Revenue is required to prove with evidence that the payments over and above, the price reflected in commercial Invoices are actually made. In the Instant case the same is absent. Moreover, we find that the adjudicating authority himself observes that there is a difference in the particulars mentioned in proforma invoice, and the invoices submitted along with bills of entry. Therefore, we are of the view that in the facts and circumstances of the case, proforma Invoice cannot be a basis for rejection of transaction value, alleging undervaluation.

15. Another set of evidence that the department relies upon - the WhatsApp messages claimed to have been retrieved from a Samsung mobile. The appellants submit that the recovery of the mobile is not recorded in any of the Panchanama or statements, and that the data was not retrieved following due process of law under Section 138C of Customs, Act, 1962. The adjudicating authority observes that the said mobile was submitted by Shri Pankaj Jain, during the course of recording of his statement in another case, against M/S Jain and sons, Jaipur, the chats show that Shri Jain was in constant contact with Chinese supplier. especially with Ms Kitty Jiang, Sales Manager of M/S Zhejiang New Debao Machinery Co. Ltd., and Shri Tarun Bald, the alleged Hawala operator, he accepted the use of the said phone and that one of his employees Shri Omprakash Sharma used the mobile for some time and Shri Sharma denied that he used the phone. Also the Learned adjudicating authority does not deny the explanation of the appellant, but avers that Shri Jain submitted his telephone voluntarily, and if it was misused, it was for Shri Jain to prove the same. Learned adjudicating authority says that the data was retrieved under Panchanama and was copied on to a pen drive. However, the authority finds that the phone was submitted by Shri Jain, and the fact was never retracted. We find that such negative evidence, would in no way serve the purpose of allegations levelled. It is for the Revenue to prove that the phone was recovered from/ submitted by Shri Jain. The fact thereof must have been recorded under a Panchanama, which is a public document. It is not the case of the department that as regards the seizure and retrieval of data/from the phone, the procedure laid down under Section 138C of the Customs Act, 1962 was followed, so as to show the evidentiary value of the same. We find that the learned adjudicating authority gives similar finding in respect printout of emails. He finds that these are printed on paper and were submitted by the persons concerned under proper Panchanama and thus are not electronic records but paper records. We find that this argument neither logical nor convincing.

16. Learned Adjudicating authority relies upon the IMEI details of the phone obtained and call data of records to establish that the mobile in question was used by Sri Pankaj Jain. He also relies on fact that mobile contains personal and family photographs of Shri Pankaj Jain. However, it is not the case of Revenue or the adjudicating authority that such electronic evidence was retrieved following the procedure laid down under Section 138C of the Customs Act. We find that even if cell phone is submitted by Shri Pankaj Jain and the computer printouts were submitted by concerned persons, the provisions of Section 138C are still obligated. On a plain reading of Section 138C, it is seen that the sub-section does not differentiate between the extracts of printouts taken by the officers or submitted by concerned persons or parties. Therefore, we find that the evidentiary value of such printouts is lost in the bargain, looking into the fact that data available in electronic form is prone to manipulation.

17 The adjudicating authority further lies upon the documents forwarded by freight forwarders after obtaining the same from their master in China. Appellants have taken serious objection to the documents urging that same have not been obtained through official channels, through overseas customs network. We find that documents have not been authenticated by Customs authorities at the respective port of export. Interestingly, Learned Commissioner finds that the Importer is correct in pointing out that documents in question have not been directly obtained from a Chinese shipper and that these have not been verified from the Chinese Customs. However, he proceeds to rely upon the documents finding that the freight forwarders confirmed the receipt in his e-mail of customs declaration commercial invoice/packing list on the basis of declarations given in China, and that the documents have been submitted, well recorded in the statement. Interestingly, improbable dates such as 20:18:13, 15:22:55, 17:14:07, 12:03:47 are seen. We also find that some of the documents relied upon by the department are but blank pages with a signature purportedly to be in Chinese containing no information. Ongoing through the e-mails, as submitted by Ld Counsel, the format of e-mails at some places is different from the normal mails sent. These aspects do cast a shadow of doubt on the nature of evidence.

18. Appellants have contended that the goods were initially assessed and cleared by the customs authorities and later on 18 investigation was taken up by D.R.I., and there was no proposal in the SCN to reject the transaction value declared and without first rejecting the value already taken for the assessment, the value cannot be re-determined; that no data of contemporaneous imports has been relied upon. We find that Ld Adjudicating authority finds that this is not a case of appraising of Bills of Entry wherein the firstly declared value is to be rejected and thereafter sequentially consideration of the rules of the Customs Valuation (Determination

of value of Imported Goods) Rules 2007 is to be undertaken. These are the provisions to be followed at the time of importation, that situation has long gone. In the instant case, the investigation has revealed the actual transaction value based on cogent evidences. Therefore, the actual price taken being the transaction value under Section 14 of the Customs Act, 1962, we find that the observations of the Learned Commissioner are very curious. Once the goods are assessed and cleared, there was no reason for rejecting the declared value and re-determining the same following the CVR 2007-sequentially First of all, the declared transaction value needs to be rejected and the value requires to be re-determined in terms of CVR, 2007, and it was incumbent upon the investigation and the adjudicating authority to show reasons for rejection of the declared assessable value and the results as to how the price adopted for rejecting the value is determined. This is a settled principle of valuation as held by this Tribunal as well as various Courts. Therefore, we are not inclined to accept contention of the Learned Adjudicating Authority.

19. We find that Learned Counsel for the appellant have relied upon the Apex Court judgment in the case of Canon India and other High Court decisions and this Tribunal, holding that officers of DRI are not proper officers for the purposes of Section 28 of Customs Act, 1962 and hence show cause notice issued, lacks jurisdiction, and, on this ground, the impugned order requires to be set aside. As per our discussion above, we find that the show cause notice and the OIO are not maintainable and that the OIO is liable to be set aside, we are of the considered opinion that we need not deliberate on the issue of Jurisdiction and the same can be kept open.

20. We find that learned authorised representative has relied upon various cases to support their arguments. We find that in the facts and circumstance of the cases, they are not applicable in view of our discussions as above.

21. In view of the above, we find that the impugned order and show cause Notice are not maintainable on merits. Accordingly, the impugned order is liable to be set aside. We set aside the same with consequential relief if any, as per law. In the result, both appeals i.e. C//50019 /2019 and C50020/2019 are allowed.”

Hence, the CESTAT concluded in its order that impugned order and show cause notice are not maintainable on merits and thus liable to be set aside. Hence, the appeals of the assessee were allowed.

2.3 In the appeal before the Id. CIT(A), the appeal of the assessee was allowed by observing as under:-

“d) The decision of adjudicating authority relied upon by the AO was not accepted by CESTAT. The SCN issued by DRI was held to be lacking jurisdiction and the order of DRI was set aside. The order of DRI and SCN was held to be not maintainable on merit. The said order was set aside and appeals of appellant were allowed.

e) The above facts clearly show that the very foundation of the addition made by the AO does not survive after the CESTAT order dated 08.02.2022 and do not subsist. The entire addition has been made by the AO based on order of DRI. Appellant filed appeal before CESTAT against the order passed by DRI. This appeal was decided in favour of appellant by CESTAT and it was held that SCN issued by DRI lacks jurisdiction and the order of DRI was set aside by CESTAT. The appeal was decided in favour of appellant both on legality and on merit. Thus, the order of DRI dated 08.08.2019 (based on which the AO has made this addition) does not subsist / survive after the CESTAT order. Thus, the basis of addition made by the AO does not subsist/survive.

f) Since the very basis of the addition made by the AO does not survive, therefore, the addition made by the AO of Rs.7,65,602/- also does not survive and deserves to be deleted. Respectfully following the order of CESTAT in appellants own case, the addition of Rs.7,65,602/- made by the AO is hereby deleted. GOA no. 2 is allowed.”

2.4 During the course of hearing, the ld.DR relied upon the order of the AO.

2.5 On the other hand, the ld. AR supported the orders of the ld.CIT(A)

2.6 We have heard both the parties and perused the materials available on record. It is not imperative to repeat the facts of the case as the ld. CIT(A) has elaborately discussed the issue in question and taken into consideration the order passed by the CESTAT wherein the appeal was decided in favour of the assessee on legality and merit and the order of the AO does not survive after the order of the CESTAT. The ld. CIT(A) respectfully followed the order of the CESTAT and deleted the addition made by the AO and we also concur with the findings of the ld. CIT(A) which has merit. Thus the appeal of the Revenue is dismissed.

3.0 Since the appeal of the Revenue in ITA No.29/JP/2023 for the assessment year 2013-14 is dismissed, therefore, the decision taken therein shall apply mutatis mutandis in the appeals of the Revenue in ITA No. 30 to 32/JP/2023. Thus all the appeals of the Revenue are dismissed.

4.0 It is also pertinent to mention that in these appeals the liberty is granted to the Revenue in case they succeed in the appeals filed by them before Hon'ble Rajasthan High Court against the order of CESTAT and then in that eventuality afresh order would be passed by the AO considering the Hon'ble High Court judgement after providing opportunity of hearing to the assessee.

5.0 In the result, the above appeals of the Revenue are dismissed

Order pronounced in the open court on 28 /03/2023.

Sd/-

(राठोडकमलेशजयन्तभाई)
(Rathod Kamlesh Jayantbhai)
लेखासदस्य / Accountant Member

Sd/-

(संदीप गोसाई)
(Sandeep Gosain)
न्यायिकसदस्य / Judicial Member

जयपुर / Jaipur

दिनांक / Dated:- 28 /03/2023

*Mishra

आदेश की प्रतिलिपिअग्रेषित / Copy of the order forwarded to:

1. The Appellant- The ITO, Ward 6(2), Jaipur
2. प्रत्यर्था / The Respondent- Smt. Sonal Jain, Jaipur
3. आयकरआयुक्त / The Id CIT
4. आयकर आयुक्त(अपील) / The Id CIT(A)
5. विभागीय प्रतिनिधि, आयकरअपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्डफाईल / Guard File (ITA No. 29 to 32/JP/2023)

आदेशानुसार / By order,

सहायकपंजीकार / Asstt. Registrar